No. 91 1027

FILED
DEC 27 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DIANE L. WALDRON-SHAH
Petitioner,

versus

THE BOARD OF RETIREMENT OF THE
LOS ANGELES COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

DIANE L. WALDRON
617 Ocean Avenue
Santa Monica
California, 90402
(310) 394-3506
In Pro Se

Questions Presented

1 ~ Whether the California Code of Civil Procedure Section 1094.5.a, which precludes a trial by jury, is unconstitutional under the Seventh Amendment of the Constitution which guarantees that the right to trial by jury shall be preserved; but only in these special circumstances wherein an appeal from the County agency administering an unregulated employees' pension fund, can only be taken on writ to a judge in the County's court, and this deprivation of a trial de novo before a jury, where the agency cannot predetermine the evidence, has allowed decades of proven abuses of members' rights by LACERA.

2 ~ Whether the respondent, The Los Angeles County Employees' Retirement Association (LACERA), an unregulated local government agency administering a ten billion dollar pension fund, can claim not to have violated the petitioner's Constitutional right to Due Process under the Fourteenth Amendment in its hearings simply because it conformed with §31533 and §31534 of the California County Employees Retirement Act of 1937, which say nothing about how hearings should be conducted, and when of LACERA's 58,734 general members, only 228 were able to obtain any type of disability benefits in the most recent year reported, while LACERA adds a billion dollars a year to its pension fund, and when, *inter alia*, as shown by unrebutted prima facie evidence in this case, in its hearing process, LACERA and its referees, under color of judic[illegible]l authority– *continued*

Concealed, destroyed, mutilated and then lied about the contents of the petitioner's evidence in their judicial safe-keeping.

Prevented the petitioner from making a statement of her case at the hearings.

Mutilated and refused to accept much the petitioner's evidence in the hearings and left parts of her evidence that was accepted out of the referee's Summary of Evidence, in order to assert a new defense of laches later in the courts.

Violated the integrity of the hearing transcripts.

Deprived the petitioner of access to the hearing transcript and never made any statement of its case, or disclosure of its evidence, before or after the hearing, infringing the petitioner's right to rebuttal.

Concealed, then improperly used in the Referee's Recommendation and then inserted into the appendix for the court with a spurious exhibit number, an undisclosed document which LACERA used as its only substantial medical evidence to deny the petitioner's claim.

Abused its quasi-judicial powers, and the prerogative it asserts for itself to Presumption of Correctness, in order to commit frauds on the Court under the color of judicial authority, and thus, with all the above, deprived the petitioner of her Constitutional right under the Fourteenth Amendment to Due Process of Law.

3 ~ Whether it is a violation of the Equal Protection guarantees in the Fourteenth Amendment for the petitioner and all the members of this local government agency-administered pension fund to be uniquely deprived of the protection of all the state and federal statutes and regulatory agencies that protect the rights and interests of members of pension funds that are not administered by local government agencies.

4 ~ Whether it is a violation of Due Process under the Fourteenth Amendment for LACERA to claim for itself the double and contradictory legal advantages of ***being*** the trial court when it comes to determining what will be in evidence before the Superior Court, but then ***not being*** the trial court when it comes to its violations of the petitioner's Constitutional right to Due Process in its hearings.

PETITION

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RULE 14.1.d

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BY COURTS & ADMINISTRATIVE AGENCIES

The Full Texts Appear in the APPENDIX I

JUDGMENT TO BE REVIEWED

June 3, 1991, Judgment of the Court of Appeal of the Second Appellate District of the State of California .

* * *

CONCLUSION

Although this court has great sympathy for Waldron-Shah, the trial court's finding her disability is not service connected is supported by substantial evidence. Moreover, Waldron-Shah's delay in the prosecution of her claim has caused prejudice to the County such that it should be denied on that additional ground.

DISPOSITION

The judgment is affirmed.

The County to bear costs on appeal.

OTHER OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BY COURTS & ADMINISTRATIVE AGENCIES

June 15, 1973, ***Decision and Order Approving Joint Compromise and Release by the Workmen's Compensation Appeals Board***, the petitioner was awarded a settlement "based upon the information in the medical record" in regard to injuries to the "back, chest, heart and head" of May 14, 1968 and to the "back, chest and heart" on February 14, 1969.[1]

November 21, 1973 ***Notification of Preclusion from Employment due to Work Restrictions*** from Department of Urban Affairs, quoting from The Los Angeles County Department of Personnel's Workmen's Compensation and Occupational Health:

"'The following restrictions should be observed in any and all future duties which this employee may be assigned now or in the future: 1) No freeway driving or automobile riding as a passenger. 2) Preclude from emotional stress or tension, i.e. anger, anxiety, confrontations, meeting deadlines, conflicts with authority.'"

"In view of the above, it has been recommended by the Claims and Rehabilitation Division of the Department of Personnel that you file a disability retirement application as provided by Section 31721 of the County Employees Retirement Law of 1937. If you do not wish to file such an application, you can contact me and I will file one on your behalf if you so desire."

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[1] *(There is a clerical error in the Compromise and Release Order- only the heart and chest were reinjured in the elevator accident. DLW)*

April 14, 1974 ***Denial of Disability Pension*** from The Board of Retirement of the County of Los Angeles Employee's Retirement Association"an order was made, finding that you are not disabled and denying your request for a service-connected retirement allowance."

May 25, 1976, ***Notice of Separation*** "*** because of your inability to physically perform the duties of your classification."

"This proposed separation is based on your physical inability to perform the job without the following restrictions as established by the Department of Personnel, Claims and Rehabilitation Division:

1) No freeway driving or automobile riding as a passenger.

2) Preclude from emotional stress or tension, i.e. anger, anxiety, confrontations, meeting deadlines, conflicts with authority.

Also it is based on your medical condition called Systemic Lupus Erythematosus (SLE) that you are currently suffering from. This medical condition was confirmed by Occupational Health Services, Department of Personnel, on May 5. 1976, which limits your physical ability to work only a few hours per day on days when you are physically able."

March 2, 1981, ***"No Record of Appeal"*** statement by LACERA's Jerry Hampton in letter

June 3, 1988, ***Summary of Evidence, Findings of Fact, Conclusions of Law, Recommendations.*** by LACERA's referee Burstein-

Findings of Fact-

1. Applicant was employed by the County for a period of two years and four months.

2. Applicant is permanently incapacitated for the performance of her duties as a Senior Community Improvement Analyst.

3. Applicant's incapacity for the performance of her duty did not arise out of nor was it in the course of her employment with the County.

Conclusions of Law

1. Applicant is not entitled to a service-connected disability retirement.

2. Applicant is not entitled to a non-service connected disability retirement because she did not have five years of service a s required by Government Code § 31720.

July 15, 1988, ***Notification of adoption by Board of Retirement of Referee Burstein's recommendation.***

March 7, 1990, ***Judgment Denying Peremptory Writ of Mandate.*** by Los Angeles County Superior Court Judge Zebrowski.

RULE 14.1.e. i

JUDGMENT TO BE REVIEWED

June 3, 1991, Judgment of the Court of Appeal of the Second Appellate District of the State of California.

September 17, 1991, Remittitur to Superior Court of California, County of Los Angeles Dept. 85 # C 700717

RULE 14.1.e.ii

ORDERS RESPECTING REHEARING AND WRIT EXTENSION

July 3, 1991, A timely Petition for Rehearing was denied by the Court of Appeal of the Second Appellate District of the State of California .

August 21, 1991, A timely Petition for Review was denied by the Supreme Court of the State of California .

October 11, 1991, Order #A-253 by Justice Sandra Day O'Connor of the Supreme Court of the United States extending the time for filing of the Petition for a Writ of Certiorari to and including December 19, 1991.

RULE 14.1.e.iv
STATUTORY PROVISION CONFERRING JURISDICTION

The Constitution of the United States

Article III

SECTION 1. .The judicial Power of the United States shall be vested in one supreme Court * * *

SECTION 2. The judicial Power shall extend to all cases in Law and Equity arising under this Constitution* * *

Article VI

* * * This Constitution and the laws of the United States which shall be made in Pursuance thereof * * *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved* * *

Amendment XIV

SECTION 1.* * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Jurisdiction: This case falls under the jurisdiction of the Supreme Court under Article III because it involves the deprivation of the petitioner's Constitutional rights to due process as guaranteed by the Fourteenth Amendment, by the personnel and referees of an unregulated local government agency, acting under color of judicial authority, in a trial so unfair and offensive to the Constitution that it cannot be called Due Process of Law.

In the special circumstances of this case, the petitioner also suffered an injury in fact due to the deprivation of her Constitutional right to equal protection of the laws under the Fourteenth Amendment and to a trial before a jury under the Seventh Amendment.

All the above are Constitutional issues that properly come under the jurisdiction of the Supreme Court of the United States.

Standing: This case has standing in that the petitioner is suffering an on-going injury in fact in the form of the deprivation of her pension and her right to obtain medical insurance, through the illegal acts committed under color of judicial authority by the respondent.

Standing is sufficient to justify relief in that there is no independent grounds under California law which would uphold the judgment, absent the respondent's unconstitutional acts which, *inter alia,* led the higher courts to unwittingly affirm plain error and to unwittingly commit judicial error.

Ripeness: This case is fully ripe in that a timely petition for review was denied by the California Supreme Court, the highest court in California in which a decision can be had.

RULE 14.f

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The Constitution of the United States

Article III

SECTION 1. The judicial Power of the United States shall be vested in one supreme Court * * *

SECTION 2. The judicial Power shall extend to all cases in Law and Equity arising under this Constitution* * *

Article VI

* * * This Constitution and the laws of the United States which shall be made in Pursuance thereof * * *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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The California Code of Civil Procedure

Section 1094.5 . a

Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board of officer, the case shall be heard by the court sitting without a jury * * *

The California County Employees' Retirement Law of 1937

§31533. Referee; hearing; findings and recommendations.

Whenever, in order to make a determination, it is necessary to hold a hearing the board may appoint either one of its members or a member of the State Bar of California to serve as a referee. The referee shall hold such hearings and shall transmit, in writing, to the board his proposed findings of fact and recommended decision.

§ 31534. Service of findings and recommendations; objections; proceedings on referees report

The proposed findings of fact and recommendations of the referee shall be served on the parties who shall have 10 days to submit written objections thereto which shall be incorporated in the record to be considered by the upon receiving the proposed findings of fact and recommendations of the referee, the board may:

(a) Approve and adopt the proposed findings and the recommendations of the referee, or

(b) Require a transcript or summary of all the testimony, plus all other evidence received by the referee. Upon the receipt thereof the board shall take such action as.in its opinion is indicated by such evidence, or

(c) Refer the matter back with or without instructions to the referee for further proceedings, or

(d) Set the matter for hearing before itself. At such hearing the board shall hear and decide the matter as if it had not been referred to the referee.

Annual Report
Los Angeles County Employees' Retirement Association
For the year ending December 31. 1968

GENERAL INFORMATION -
RETIRED MEMBERS

APPLICATION FOR RETIREMENT

A retirement application is submitted to the Board of Retirement by each member who desires to retire. The Board of Retirement meets on the first Wednesday of each month to consider the applications for service retirement filed up to the 20th of the preceding month. Applications for disability retirement, accompanied by the attending physician's medical report, must be filed by the first of the preceding month to be considered at the next meeting of the Board of Retirement. *(page 4)*

Your Guide to Understanding and Selecting LACERA RETIREMENT PLANS [2]
(1991, first publication)

Definition of Disability *(page 2.5)*

2. Service Connected Disability:

A disease or injury arising from and in the course of employment that occurs or is aggravated as a result of performing your job, and permanently incapacitates you from performing the duties of your job.

When Application Must be Made *(page 2.5-6)*

(3) Any time, provided you are continuously physically or mentally unable to perform your duties from the date of discontinuance of service to the time you apply.

You may not apply if you have withdrawn your retirement contributions.

BY-LAWS OF THE BOARD OF RETIREMENT
Adopted Pursuant to Government Code Section 31525
(page 4.6-7)

II. MEETINGS

3. RULES OF ORDER

(7) Following the regular business of the Board, the Board shall consider applications for disability retirements and referee reports.

4. QUORUM

Five members of the Board of Retirement

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[2] LACERA no longer publishes the *Comprehensive Financial Annual Report and Information about Retirement, Disability, and Death Benefits for LACERA Members*.

The above 1991 brochure for new employees is, as far as is know, the first time the Board's by-laws have been available to members.

constitute a quorum.

6. COMMUNICATIONS AND REQUESTS

(B) Persons desiring to address the Board on any matter listed on the agenda, other than for a disability application or referee report, shall make their intention known prior to the beginning of the meeting by filling out a "Request to Address the Board" form which may be obtained from the staff secretary to the Board.

IX JUDICIAL REVIEW *(page 4.3)*

In any matter which the party of applicant is entitled to judicial review of any action taken by the Board of Retirement, the petition to the court must be filed within ninety (90) days from the notice of the Board's decision is delivered to the party or applicant , or served by certified or registered mail upon the party or applicant or the party's or applicant's attorney.

RULE 29.4.c

28 USC § 2403(b) may be applicable and The Attorney General of California will be served.

Rule 14.1.g

Concise Statement of this Case

This case shows the mischief that can be done to Due Process and the Justice System when a state legislature bows to political influence and abridges the Constitutional right of its citizens to be heard by a jury, the deprivation of which in this case protects the economic interests of a ten billion dollar, politically-controlled, local government pension fund that escapes all outside regulation.

This case exemplifies the offenses to the Constitutional right to Due Process that have become systematic and habitual in The Los Angeles County Employee's Retirement Association, (hereinafter called LACERA and sometimes referred to in the broader sense as The County indicating the whole governmental structure of which it is a part, including the Office of the County Counsel which represents LACERA in hearings and the courts).

So incredible are the abuses of the law and the Constitution in this case, that the petitioner has footnoted each aspect of her allegations and has provided documentary evidence in the appendices. LACERA did not even try to rebut this evidence before the court, but said only "The Board denies the petitioner's allegations,"[3] and in law, a general denial is no denial.

Appendix II contains the petitioner's *bona fides* as a member of the staff of the Board of Supervisors, which is necessary since as a federally funded employee in a rapidly expanding bureaucracy built upon federal poverty funds, in practically every document she in a different bureaucratic entity.

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[3] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)* page 4

However the whole time she was working directly with the County Board of Supervisors, who rule Los Angeles County without checks or balances. She was used to design HUD and HEW programs for which the Supervisors then obtained Federal funding. This is important to explain the insight Dr. Waldron has into how The County Board of Supervisors operates in relation to LACERA's administration, and its ten billion dollar pension fund.

LACERA is a totally unregulated, politically-controlled local government agency which is in charge of a multi-billion dollar pension fund, and has life and death powers over the pensions and right to obtain medical insurance of its members

The published mandate to LACERA's personnel is to minimize employer contributions,[4] and, as in most insuring entities, LACERA's appointments and promotions have come to be based on the bottom line which means how many claims are successfully denied.

In the most recent year for it will reveal the statistic, among LACERA's 58,734 general members, only 228 were able to obtain any type of disability retirement.[5] including for non-service-connected illness and accidents.

Without disability retirement status, the sick and disabled cannot get medical insurance, and without medical insurance many face a choice of destitution or death. Those who choose destitution for themselves and their families become a charge on the public welfare system.

While this happens, LACERA adds a billion dollars a year to its ten billion dollar pension fund.[6]

The ultimate control over LACERA is political because

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[4] *LACERA Annual Report for Members, Yr. Ended June 30, 1989,* p ii.

[5] *Ibid,* pp 59 & 60.

[6] *LACERA Annual Financial Report, Yr., Ending June 30, 1990,* p 70

the members of the County Board of Supervisors appoint those who are, along with the County Treasurer, the majority on LACERA's Boards of Retirement and Investment. The Board of Retirement appoints LACERA's administrator and he in turn controls LACERA's own, independent personnel section. (The three LACERA employees most closely involved in this case have each risen to be a Division head during the course of the case.[7])

This ultimate political control, along with the fact that LACERA deals in billions of dollars, makes very relevant, the actions of the County Board of Supervisors and their appointees, which are currently being investigated by the media.[8]

Because the members of LACERA are deprived of their Constitutional rights and protections, they have no control over what is being done with their benefits and their pension fund.

LACERA disregard for the law and cavalier attitude towards money in the hundreds of millions is revealed by the fact LACERA has for years improperly used its financial report to cover up a very, very questionable half billion dollar (plus interest over 20 years) County expenditure that never went to the voters for approval.

LACERA Comprehensive Annual Financial Report for the year ended June 30, 1990

> As of January 1, 1987, LACERA purchased two annuity contracts from insurance carriers to provide benefit payments to a portion of its retired members. * * * *(page 28)*

No other information is given by LACERA. The truth is that the annuities in question were **not** purchased with

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[7] *Comprehensive Annual Financial Rpt, LACERA, June 30, '90* page 8

[8] *APPENDIX II*, page 28

LACERA's pension fund money. Rather, the County Board of Supervisors borrowed $454.455 million dollars (plus the interest) through an unballoted debenture sold through First Interstate Bank. From this, Aetna was given two hundred million dollars to cover the pensions of 831 retirees, and Travelers was given $254 million dollars to cover the pensions of 1826 retirees (who the insurance companies got to choose.)

Two months after this deal was finalized, County Treasurer Richard B. Dixon was appointed by the Board of Supervisors to be the County's Chief Administrative Officer.

The appended newspaper clipping outlines the problems of cronyism and graft in CAO Dixon's administration.[9]

This is a very important to this case because the only administrative recourse from LACERA is to that Chief Administrative Officer, and when the petitioner provided him with prima facie evidence of LACERA's unlawful acts, seeking to have these matters remedied, Mr. Dixon replied, "I recognize that your distress stems from personal dissatisfaction with the outcome of your case."[10]

One of LACERA's unregulated violations of proper administrative procedures is restricting access by members to information about their benefit rights and the procedures to claim them, along with information about investments. In 1990, LACERA loaned more than two billion dollars in U S bonds to financially troubled Security Pacific Bank, against 102% in Security Pacific's collateral[11] the nature of which LACERA refuses to disclose.

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[9] COPLEY NEWS SERVICE, Nov. 4, 1991, *APPENDIX II* page 28

[10] *Letter of Richard Dixon, CAO of Los Angeles County, Sept. 3, 1991, APPENDIX II*, page 21

[11] *LACERA Annual Financial Report*, pages 25-26

At this same time, LACERA ceased publishing its *Comprehensive Annual Report for Employees*, and does not tell members who enquired about that report, that in its place they published a closely held *Annual Financial Report,* back in December 1990. However this *Financial Report* does not contain the same information about the full range of existing plans and benefits, and procedures, which were for a time put into the *Comprehensive Annual Report* and are once again not available in any form.

All of these things reinforce the impression made by the record of this case, of an unregulated agency that is spinning out of control, threatening not only the assets of the ten billion dollar pension fund which is its legal trust, but inflicting present hardship on the sick and disabled members of the pension fund who, like the petitioner, are being denied without due process the benefits for which they have paid with their contributions.

The members of LACERA are unable to remedy any of these matters because they cannot obtain due process from LACERA and they are deprived of equal protection of the laws, because they have no recourse to the state and federal statutes and regulatory agencies that enforce proper procedures and protect the interests of members of all other classes of pension funds. In addition, LACERA uses an unconstitutional state statute to prevent members, like the petitioner, from appealing their grievances to a jury.

THE BARRIERS LACERA PUTS BETWEEN MEMBERS AND THEIR BENEFITS

The statistic that only 228 people among the 58,734 LACERA general members were able to obtain any type of disability benefits[12] in a year is actuarially impossible absent LACERA putting insurmountable barriers between members and their benefits.

LACERA has had 54 unregulated years to perfect and systematize the means by which it avoids, evades, delays and denies claims.

These means include unlawful acts committed under color of judicial authority by its referees and administration. This case is replete with actions by LACERA that offend the Constitution and all the notions of due process and justice upon which our country was founded.

LACERA CONCEALS AND WITHHOLDS THE INFORMATION NEEDED TO CLAIM BENEFITS

For members of the retirement association seeking their benefits, the abuses begin with the deliberate concealing and withholding of information by LACERA.

The petitioner had no way to know from what LACERA wrote, said and published, that there was such a thing as a service-connected disability pension.

LACERA denied the disability application filed on behalf of the petitioner by the County itself after it made an independent determination that she was disabled from County employment as a result of the freeway crash and the elevator accident. To deny the claim LACERA used an undisclosed and nongermane report written by its employee doctor who chose never to see the petitioner.

LACERA never informed the petitioner that she had a

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[12] *LACERA Ann. R'p't for Members, Yr. Ended June 30, 1989,* p 59-60.

right to appeal its initial denial.[13] and this right was not mentioned in what they then published.[14]

To the very end of the administrative hearing process the petitioner was stonewalled when she asked for essential information on the procedures involved in the administrative hearing process, including such things as where to obtain a hearing transcript[15] and what the County Counsel's case and evidence were,[16] (through all the years and the multiple hearings, the County Counsel promised to, but never did, submit his pre-hearing statement.[17])

The petitioner wrote in detail of the unlawful things that were being done, to the administrator of LACERA, as well as the other personnel involved in the case (who are now Division heads) and did not receive a single meaningful reply.

The petitioner is probably typical of LACERA claimants in that she assumed that if she only lived long enough to get through the hearing process she could appeal to a court with a judge and jury where all would be redressed.

Nothing LACERA published or said, ever hinted at the legal finality of its hearing process. In fact there may have been deliberate deception when the first referee said loudly to the Deputy County Counsel outside the door so the petitioner could hear it, "She just going though the motions

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[13] See *Annual Report for 1968* on page 9, above, and the *Letter of Denial* on page 76 of *APPENDIX I.*

[14] *Annual Report Los Angeles County Employees' Retirement Association For the Year Ending December 31. 1968* p 10 above

[15] see *Transcript Burstein Hearing, APPENDIX II,* pages 6-17

[16] see *Letter to Referee Burstein, Ap 14, 1988, APPENDIX II* p 22

[17] see *Transcript Burstein Hearing, APPENDIX II,* page 17 & *Correspondence between Referee Burstein and County Counsel APPENDIX II,* pages 21-22

to get out to the court."[18]

It was only when the petitioner asked to have a jury at the Superior Court that she learned that LACERA'S administrative hearing process was legally a trial and she would never be entitled to another.

Surely proper notice is not just the when and where of an administrative hearing, but its legal import as well.

REFEREES BIAS TOWARDS THEIR EMPLOYER EXTENDS TO INTERFERING WITH INTEGRITY OF HEARING TRANSCRIPT

LACERA hires referees who work for it for years.

The short topical excerpts from the hearing transcripts in *Appendix II* reveal the illegal acts these referees commit under color of judicial authority.

At both hearings the County Counsel was clearly being directed by the referees who made no effort to disguise their bias, as the excerpts from the hearing transcripts in *Appendix II* clearly show.

Referee Black held the petitioner's original application behind the open top of his briefcase and misrepresented what had been written on it, reducing the claim to almost nothing,[19] Referee Burstein then claimed in his hearing it no longer existed, but finally long after the hearings he included it with the documents of the case, however in his summary of evidence he too misrepresented what was written on it and that the attachments had been removed while in LACERA's safekeeping- County Counsel referred to what was on these attachements at the second hearing.[20]

In several instances the referee prompted the County

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[18] *APPENDIX II*, page 20

[19] *APPENDIX II*, pages 1-4

[20] *APPENDIX II*, page 11

Counsel to lie about documents in the County Counsel's possession, and the County Counsel refused[21] . (This County Counsel was replaced with ones who followed with the referees' lead.)

The referees repeatedly signaled Ms. Michele McCoy, the court reporter used by the County on both cases, to stop taking down what was being said and there are clear gaps in the context of the transcripts where this happened.[22]

It appears that other statements may have been improperly redacted after the fact because points of due process reflecting on Constitutional issues that were heatedly raised, even argued over, in the hearings, simply do not appear in the transcripts.

Court reporter McCoy told the petitioner after the second hearing, where the petitioner finally learned from whom to obtain transcripts, that all the transcription, computer disks and printout from the first hearing, held only 18 months before, had been lost by her office.[23] and therefore she could not provide a copy of the transcript to the petitioner. LACERA refused to even let the petitioner read their copy of the transcript in their office, in spite of repeated requests[24]

The petitioner prepaid for a copy of the January 1988 hearing transcript and despite many requests, Court Reporter McCoy did not send this until the end of December 1988, months after the writ of mandate had to be

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[21] *APPENDIX II*, pages 10-11

[22] *APPENDIX II*, page 17

[23] *Note: County Counsel McCoy the principal counsel n this case has not responded to repeated interrogatories as to whether he is in any way related to Court Reporter McCoy.*

[24] *APPENDIX II*, page 18-20

filed with the Superior Court.[25] The petitioner did not get to read through a transcript from the first hearing until years later, after LACERA had to surrender a copy for the court.

As is shown in the transcript excerpts from both the Black and Burstein hearings, the petitioner was bullied out of her rights to be heard and to present evidence[26], and she did not realize that this loss was irreversible so she let respect for the referees' judicial role[27] and her own medical condition,[28] combine to force her to defer to the referees, since she assumed it would all be put right later in a court with a judge and jury. It was only in the Superior Court that she learned she was not entitled to either a jury or a trial de novo by the judge.

An excellent retirement lawyer had said in about 1984 that he he would take her case if she ever got through LACERA's endless delays to the court, but then he discovered the impossibility of winning against the County in matters involving LACERA and in 1988, he refused to take the case in spite of its much larger than usual contingency fee, explaining to the petitioner-

> They delay until your client is dead. They use the County Counsel to paper you to death. They do anything they want because there are no legal handles on LACERA. I'll never take another County case!

LACERA Illegally Removes the Petitioner's Evidence from the Hearing Record to Prepare for a New Defense of Laches on Appeal

[25] *APPENDIX II*, page 5

[26] *APPENDIX II*, pages 1-2 and pages 15 and 17 .

[27] *APPENDIX II*, page 40

[28] *APPENDIX II*, page 2

The abridgement by LACERA of the petitioner's right to present evidence extended beyond the hearings.

Referee Burstein simply left out of his Summary of Evidence, the prima facie evidence the petitioner had presented of LACERA's illegal acts, bad faith, and unclean hands in the matter of delays, which he himself had accidentally let come into evidence in the hearing during the paper shuffling intended to keep out the petitioner's evidence from the previous hearing.[29]

In Referee Burstein's Summary of Evidence for the Board of Retirement the petitioner's evidence on bad faith, illegal acts, and unclean hands in the matter of delays has been eliminated thusly–

> Exhibit 51 Various letters to or from Applicant
> These letters were not relevant to the underlying issues in this matter.[30]

However these matters were far from irrelevant to the case because once the evidence of LACERA's unclean hands in the mater of delays had been eliminated by Referee Burstein in the administrative hearing process, the County Counsel used a defense of laches in the higher courts, and succeeded with that defense in the Appeal Court, notwithstanding that by the admission of the court itself in its decision,

> None of the delays was explained by either party and each side blames the other for the failure to set necessary hearings.[31] ,

and under California law, laches is an affirmative defense which must be proven.

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[29] *APPENDIX II*, page 11-12

[30] *APPENDIX I*, page 64, and page 37 in original document *The Recommendation to the Board of Referee Burstein.)*

[31] *APPENDIX I, page 20*

> The burden of proving laches rests upon the one relying on such a defense. *Brown v Oxtoby* (1941) 114 P 2D 662 45 CA 2D 702.
>
> Where no direct evidence is introduced on an issue, the finding is properly against the party who has the burden of proof. *People v Thomas* (1952) 239 P 2d 914 108 CA 2d 832

Thus the ruling of laches for the first time by the Court of Appeal is judicial error sufficient to reverse. The petitioner made this legal point in her petition below, but she was not granted a rehearing or review, so this point was never considered by the court.

LACERA CONCEALS THEN ILLEGALLY INSERTS ITS 'SUBSTANTIAL' EVIDENCE TO DENY INTO THE RECORD

The activities of LACERA's referees and legal staff were not just limited to keeping statements and documents out of evidence, they also improperly inserted undisclosed documents into the legal evidence after the fact.

In this case, LACERA's "substantial" evidence to deny[32] was a report written without seeing the petitioner by the County's own doctor in 1974. This report was never revealed as being the basis for denial at the time of the original denial, which is not lawful in California[33] and despite repeated opportunities this report was not submitted by County Counsel at the hearing of record, nor

[32] *APPENDIX I*, pages 15-16, Decision of the Court of Appeal

[33] The award must be based on evidence... legally and properly introduced. .... a trier of facts, has no legal right to predicate its award upon the opinion of its own or any other expert when such opinion does not appear in the record. *Young v Industrial Accident Commission* (1940) 38 CA 2 d 250, 257, 100 p 2d 1062

afterwards. And despite the protests of the petitioner[34] , County Counsel never made a pre-hearing statement in all the years the hearings dragged on.[35]

Instead, this 1974 document just appeared in Referee Burstein's Recommendation to the Board with his footnote saying the Moss report had been "submitted"[36] at a previous hearing (at which in fact no evidence was taken[37] and from which Referee Burstein himself emphatically ruled that no evidence would be carried over.[38]) And of course there was no pre-hearing statement by County Counsel before or after any of the hearings so this document was never revealed.

And, as noted above, petitioner was also prevented by LACERA from obtaining copies of the transcripts,[39] from which she could have discovered the Moss report had never legally been entered into evidence.

To use the Moss report, LACERA had to assert its trial court right to presumption of correctness and stand upon the rule of substantial evidence. LACERA asserted that all the decades of medical evidence to the contrary, notwithstanding, the Moss report was the ***only*** substantial evidence. LACERA dismissed the decades of weighty evidence to the contrary by saying–

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[34] *APPENDIX II*, page 22

[35] see *Transcript Burstein Hearing*, *APPENDIX II*, page 15 & *Correspondence between Referee Burstein and County Counsel APPENDIX II*, pages 21-22

[36] *Burstein Recommendation to the Board*, *APPENDIX I*, page 66

[37] *Black Hearing Transcript*, *APPENDIX II*, page 4

[38] *Burstein Hearing*, *APPENDIX II*, page 7.

[39] see *Transcript Burstein Hearing*, *APPENDIX II*, pages 8-10 & *letter to Charles Spenser, Retirement Administrator, Jan 11, 1988*, *APPENDIX II* page 18.

> But not all medical opinion amounts to "substantial" evidence.* * *
>
> *RESPONDENT'S ANSWER TO PETITION FOR REVIEW*, page 5

It was upon the Moss report, under the rule of substantial evidence, that the Appeal Court had to affirm the decision below[40]

> Although this court has great sympathy for Waldron-Shah, the trial court's finding her disability is not service connected is supported by substantial evidence.
>
> *APPENDIX 1*, page 20, Conclusion to the Opinion of the Court of Appeal

This use by LACERA of undisclosed, illegally inserted evidence as their substantial evidence to deny, was a fraud upon the court creating plain error sufficient to reverse.

LACERA Depends upon a Law that Offends the Seventh Amendment

After LACERA stacked the evidence against claimant in its administrative hearing process, LACERA then used the California Code of Civil Procedure §1094.5 to limit any appeal from a County administrative hearing to a judicial review on a writ of mandate before a judge in the County's court,[41]

LACERA then demanded for its hearing process Presumption of Correctness from the courts,[42] and relied

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[40] *APPENDIX 1*, pages 15-16, Decision of the Court of Appeal

[41] *RESPONDENT'S BRIEF ON REHEARING, (California Court of Appeal) 6/26/91*, page 2.

[42] *Respondent's Response to Petition for Writ of Mandate, 12/7/89* Page i, *JOINT APPENDIX* p 453

upon the Rule of Substantial Evidence.[43]

LACERA told the Superior Court it was entitled to be PRESUMED CORRECT,[44] (as it capitalizes and underlines this instruction to the court) and had the right as a trial court to determine what would be in evidence before the Superior Court.

But then, when LACERA's unlawful acts in its hearing process were at issue before the Court of Appeal, LACERA told the Court of Appeal that the Superior Court was the "trial court"[45], and said "Fact-finding is the province of the trial court, not the courts of appeal* * *."[46] And thus LACERA precluded consideration of what happened in its hearing process. However, this is a total perversion of the judicial process, because, LACERA was the trial court since it demanded the right to have its selection from the evidence adhered to by the Superior Court, and by definition–

> **Trial court.** The court of original jurisdiction where all evidence is first received and considered; * * *
>
> *Black's Law Dictionary, Abridged Sixth Edition,* 1991, page 1046

In this case, LACERA's defense is that the issues of its unconstitutional and unlawful acts were not raised in what LACERA ***now*** calls the "trial court".[47] though of

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[43] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)*, page 2.

[44] *Respondent's Response to Petition for Writ of Mandate, 12/7/89* Page i, *JOINT APPENDIX* p 453

[45] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)*, page i, 2, 3,4,6,7.

[46] *Ibid*, page 6.

[47] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)*, page 3

course they were most certainly raised repeatedly in the hearing process when the petitioner was able to do this herself, as the entire *Appendix II* attests. And the petitioner contends that this was the trial court since LACERA demanded for its hearings a trial court's prerogatives, including the exclusive right to take evidence.

When the petitioner wanted to press the issues of LACERA's illegal acts, the attorney she found for the appeal, threatened her with, "The judge knows all about the things the County does and he doesn't need you to tell him. If you bring up any of these things it will make the judge very angry and you will lose your case. The judge doesn't want confrontations in his court."[48]

Because it is so hard to win a case against the County, is is very, very difficult to find legal counsel and this firm whose name the petitioner discovered on the losing side of a case cited against LACERA, was the only one which would take her case.

The County Employees Retirement Law of 1937, is Unconstitutional in Parts and is Silent on Critical Matters of Due Process

LACERA claims that all the petitioner's rights were protected because LACERA abided by California Government Code §31533 and §31534, the County Employees Retirement Law of 1937.[49]

However, all that is said in the code of the entire hearing process up to the point that the referee sends his decision to the Board, is a referee may be a member of the Board or of the County Bar, in §31533. And §31534 does not provide for claimants or their attorneys to appear

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[48] *APPENDIX II*, pages 18-20

[49] *RESPONDENT'S BRIEF ON REHEARING, (California Court of Appeal) 6/26/91*, page 2.

before the Board of Retirement, which is also specifically prohibited by the by-laws of LACERA.[50]

When the petitioner approached state legislators to have The County Retirement Law tightened up, even the redoubtable Tom Hayden said, "We leave the County alone and they leave us alone."

When the petitioner sought the help of the State Department of Insurance,they regretfully replied that they have no jurisdiction over LACERA.The State Insurance Department simply has no authority over LACERA.

The US Department of Labor also told her that they have no authority over local government agencies and local government agencies do not fall under the ERISA statutes.

LACERA does not come under any state or federal Administrative Procedures act.

In fact as a local government agency, LACERA is free of all outside regulation, and shelters under government immunity from penalties for its wrong doing.

There is simply nowhere for the members of LACERA to turn except to the Constitution of the United States and its guarantee of a trial before a jury, or failing that perhaps to the provision of Federal Masters in Chancery under Rule 53 of the Federal Rules of Civil Procedure.

This case exemplifies, with prima facie evidence covering 23 years, the unregulated and unconstitutional activities by which LACERA so successfully reduces the number of members who are able obtain disability benefits. None of LACERA's means for doing this would be permitted under any Administrative Procedures Act, nor ERISA, nor would they be countenanced by a jury.

The County has offered no rebuttal to the charges of unlawful acts, supported by prima facie evidence, that have been alleged and protested in this case by the petitioner

[50] *LACERA Retirement Plans pp 4.6-4.7, PETITION* p. 9

over more than a decade . The County's only response is that "The Board denies the petitioner's allegations."[51] And in law, a general denial is no denial.

Neither has the County attempted to argue against the laws which create plain error and judicial error in the judgment against the petitioner.

Neither has the County addressed the Constitutional issues. LACERA simply told the court it has abided by §31533 & 31534 of the Retirement Law and therefore the petitioner's Constitutional rights have been protected.[52]

RULE 14.1.h

FEDERAL QUESTIONS

The Constitutional issues were raised as soon as the petitioner discovered them, to the best of her ability and whenever she was permitted. A good measure of the deprivation of Constitutional rights in this case involves her not being allowed to effectively raise the Constitutional issues.

The Constitutional issues were the major part of the argument in the petition for rehearing, prepared by the petitioner in the few days remaining after her attorney said he would not continue with the case, and without the benefit of her complete case file.[53]

The petitioner herself was the only one to raise these matters because her attorney told her he would not mention the Constitutional issues or LACERA's unlawful behavior because to do so would be "unethical," and

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[51] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)* page 4

[52] *RESPNDENT'S BRIEF ON REHEARING,* page 2

[53] *APPENDIX II,* page 26

would "make the judge very angry" and she would lose her case.[54] However, his advice may have been tainted by conflict of interest because his firm benefits from County Worker's Compensation cases, and his interest in a good relationship with the county is indicated by that fact that in spite of repeated opportunities, including forwarding the remittitur to his client, he chose not to tell his client that she had been awarded costs against the County and had to file for them.[55]

The most concise statement of the Constitutional issues by the petitioner is to be found on page 3 of her Petition for Review to the Supreme Court of California-

> Because LACERA claims immunities as a government entity from all outside regulation by by such bodies as the California State Insurance Department, the Department of Labor, and the federal ERISA statues, and immunity from claims for damages and bad faith, all of which things constrain abuses by other pension funds, the situation as a whole is a Miscarriage of Justice in which the petitioner has been deprived of her Constitutional right to due process, and because these unregulated abuses only occur in funds which shelter under government agency status, to equal protection of the State and Federal laws that protect members of other pension funds. The petitioner also contends that none of these abuses could prevail if state laws governing County Retirement Funds did not deprive her of the Constitutional right to a trial before a jury. (*emphasis added, DLW*

[54] *APPENDIX II*, pages 24-25.

[55] *APPENDIX II*, page 26

Rule 14.1.j
Concise Argument
for the Allowance of the Writ

It is now only the Supreme Court that can correct these offenses to the Constitution which have fostered corruption in a huge, unregulated, local government pension fund, and have allowed that fund to wantonly deprive its members of their benefits through abridging their right to due process in its administrative procedures and hearings. These things could never happen if the members had their Constitutional right to take their grievances to a jury.

The California Code of Civil Procedure Section 1094.5.a clearly offends the Constitution.

> Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board of officer, the case shall be heard by the court sitting without a jury * * *.

This statute inarguable offends Amendment VII of the Constitution–

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *

In light of Amendment VII, there can be no question that California California Code of Civil Procedure Section 1094.5.a is unconstitutional, and the second paragraph of Article VI of the United States Constitution is unequivocal-

> This Constitution and the laws of the United States which shall be made in Pursuance thereof * * *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The remedy for this offense is clearly within the jurisdiction of the Supreme Court under Article III of the Constitution–

> SECTION 1. The judicial Power of the United States shall be vested in one supreme Court * * *
>
> SECTION 2. The judicial Power shall extend to all cases in Law and Equity arising under this Constitution* * *

Therefore, §1094.5.a of the California Code of Civil Procedure offends the Seventh Amendment of the Constitution and it is within the jurisdiction and power of the Supreme Court of the United States to declare that law unconstitutional and remedy the abuses that have grown out of it, endangering the public good and causing severe hardship for thousands of individuals, including the petitioner, who are deprived of due process in the administrative hearings when they seek their pension fund benefits and then have no redress before a jury.

The remedy to all this is to declare §1094.5.a of the California Code of Civil Procedure unconstitutional in the special circumstance of conjunction with the California County Employees Retirement Law of 1937 and thus restore to the petitioner and the other members of LACERA their Constitutional right under the Seventh Amendment to a trial before a jury.

The petitioner understands that this court must be concerned not to increase the burden on the courts below. However, under §1094.5.a, the litigants already have the right to take an appeal to the County Superior Court on writ of mandate, and can appeal from there to the Court of Appeal, therefore finding §1094.5a unconstitutional would not open the doors of the courts to any additional cases.

In fact it would vastly reduce the burden of cases on the courts if §1094.5a were found unconstitutional and the members of the pension fund who are aggrieved in the administrative hearing process were allowed their Constitutional right to a trial de novo before a jury, because the one thing a pension fund like LACERA fears is a jury of outraged citizens, and therefore LACERA would abide by due process to avoid a jury.

This case will not effect administration law generally because these are very special circumstances wherein, a politically-controlled, totally unregulated local government agency, with governmental immunities from civil actions, is administering a pension fund to which members contribute to be insured against disability, and that agency can confine the appeal from its own administrative decisions to a judge in its own court. And, of course, the members of LACERA already have and use the right to appeal to the courts.

The courts below would therefore benefit greatly from a ruling that §1094.5.a is unconstitutional in these special circumstances.

Consider how many appeals are generated by a situation in which for 58,734 LACERA general members, only 228 are successful in obtaining their benefits in a year. The unsuccessful claims often involve just, but legally futile, appeals that weigh on the consciences and calendars of the court.

In light of the above, please consider what the Court of Appeal wrote in its Conclusion on this case, and the extraordinary gesture the Appeal Court made–

CONCLUSION

> Although this court has great sympathy for Waldron-Shah, the trial court's finding her disability is not service connected is supported by substantial evidence. Moreover, Waldron-Shah's delay in the prosecution of her claim has caused prejudice to the County such that it should be denied on that additional ground.

DISPOSITION

The judgment is affirmed.

The County to bear costs on appeal.

The petitioner prays this honorable court for the Constitutional remedies and resultant reliefs, for which she, and the sick and disabled members of LACERA, and their families, have waited so long.

Respectfully submitted,

D L Waldron

Diane L. Waldron
Petitioner in Pro Se December 19, 1991

Note: Rule 33.3. as regards Rule 14.1(f) applies to page length. There are 5 pages under Rule 14.1 (f) within the petition.